Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN J. WALSH

Petitioner

v.

GALE NORTON, SECRETARY OF THE INTERIOR

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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The questions presented for review in the terms and circumstance of the case are whether or not:

(a) The respondent controls the composition of its competitive civil service work force by rendering unlawful consideration to proscribed factors.

(b) The lower courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Such concerns the apparent judicial selective omission of consideration of material circumstances, genuine issues of material fact and this Court's relevant precedents as done by the lower courts in the rendering of their erroneous decisions.

(c. The Federal actor lacked the lawful authority to implement its affirmative action/diversity plan.

(d) The respondent's diversity/affirmative action plan was invalid.

(e) This instant case's selection process was unlawfully discriminatory.

(f) The respondent acted in bad faith.

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JURISDICITION

The Court of Appeals Decision: January 10, 2003 and the denial date of the timely petition for rehearing: April 22, 2003 as at Appendix E.

On July 23, 2003 and in application No. 03A59 the time extension to file this petition was granted to and including August 20, 2003. On August 28, 2003, by letter, the date for resubmission included October 28, 2003. On November 4, 2003 by letter the date for resubmission included January 3, 2004.

The Court's jurisdiction is invoked under 28 U.S.C. at 1254 (1),

PROVISION OF LAW AND TREATIES INVOLVED

As at Appendix G: the Constitution of the United States and emanation therefrom and The Universal Declaration of Human Rights.

STATEMENT OF THE CASE

This case stems from the initial employment discrimination claim filed by petitioner. (DE 25's Ex. 1 as the Report of Investigation (ROI) Ex. 2 therein)

Therein petitioner states:

> "As precluded from inclusion into and therefore as a non-member of any Affirmative Action beneficiary group...(complainant) has been discriminated against regarding merit based objective consideration for multiple upward mobility employment opportunities. ...As it is known by statistical analysis and as advocated by the Department Secretary, that members of Affirmative Action...groups receive preference as a matter of official policy: this results in discrimination against non-preferred...applicant..."

Thereby, petitioner maintains that the respondent, in it's quest for the in effect mandated achievement of diversity as a matter of official policy; unlawfully controls the composition of the competitive civil service via abuse of process. (City of Richmond v. J.A. Croson)

As regarding overall diversity goals, (DE 18 at 39; "strategic Plan", DE 36-Exhibit No. 162) "and that they expect results...and...he means business...", (DE 25's Gov. Exhibit 3 at 32) the defendant engages in analysis of the occupational fields used in its endeavors and the qualification requirements for entry therein, in conjunction with the distinct qualification attainment levels of the separate protected groups that comprise the total workforce.

As is common knowledge, such statistical analysis reveals the differences existing between the Civilian Labor Market (CLM) and the Civilian Labor Force (CLF) and how the composition of the two sets are not proportionally interchangeable as regarding the distinct protected groups. As by definition, the CLM is different from the CLF. (DE 36's exhibit No. 161—

http:11www.doi.gov/diversity/98doi16/sld 001.htm, DE 25's go. Exhibit 3 at 34, DE 39 at 16, 17, DE 32 at 2)

Nevertheless, as proclaimed in the public domain, the respondent sets its overall diversity goals at a level that exceeds CLM proportional representation, while strongly advocating diversity achievement levels that even exceed the CLF representations as done via motivational incentives and supervisory level performance plan evaluations. (Appellant's br. At 3, 4, 8, DE 25's gov. exhibit 3 at 31-34, DE 39 at 13-15, DE 22 at 8, 10)

In sum, for purposes of overall diversity goal achievement and due to the different levels of qualifications attainment that exist between the protected groups as pertaining to the various occupational fields; the respondent by design thereby disproportionately over-represents defined affirmative action/preference eligible protected group members in the occupational fields that are less stringent and/or that are deliberately more ambiguous in regards to qualification requirements for entry therein. (DE 25's Ex. 1: ROI Ex. 4 at 22, 26-30, id. Ex 8 at 11, 12, 18, appellant br. At 8, DE 39 at 16)

Such preferential placement is facilitated by the Federal actor's defeasant role as indicated by its emphasis of diversity goal achievement as to trump Civil Rights Act law. (Affirmatio unius exlusio alterius) The means for the accomplishment of such lies in its supplied but nevertheless abused authority as a "delegated examining unit". Bearing witness to same is the respondent's non-use of the standard civil service Administration Careers With America, (ACWA) test, which is still valid, unlike its predecessor the PACE test, that the respondent's EEO director is selectively confused/ignorant about as indicated by the distorted content of Appendix F. Additionally, the respondent disregards the Office of Personnel Management's (OPM) controlling qualification standards, (appellant's br. At 39-41) but adheres to : "while maintaining a culturally diverse workforce" as a matter of official "Placement Policy" (DE 25's Ex. 1; ROI's

Ex. 21 at 2), and does so by means that are contrary to the EEOC's "Uniform Guidelines on Employee Selection Procedures"; 29 CFR. (DE 39 at 10, 11, DE 27 at 15)

Consequently, the non-minority male group, as the only "protected" group precluded from receiving eligibility status as an affirmative action beneficiary group, is via the abuse of the myriad of inofficiously designed application and selection processes; unlawfully disfavored as regarding entry into the particular fields and/or grade levels of positions that the respondent "targets"/seeks to place its preferred group members into. (DE 39 at 3, 10-12, DE 22 at 14)

Thus, the collective burden of affirmative action/preference programs is inherently concentrated. Moreover, the affects of such preferences, that in the past have been said to be of a diffuse nature, are nonetheless primarily concentrated in particular fields and levels. (DE 22 at 14) Or as stated on petitioner's same aforementioned initial employment discrimination complaint:

"An objective evaluation of (petitioner's) application(s)...in the Department will indicate that measurably lesser qualified institutionally preferred...applicant(s) were selected. This exists...notwithstanding the fact that...preferred...were disproportionately over represented in the same fields or same grade levels that...(petitioner) pursued employment in."

Accordingly, petitioner "views the "number one critical element" as pertaining to diversity achievement and maintenance as measured on management's performance evaluation plans" as being related to the legal concept of "natural and probable consequences" that are manifest in results as outlined in the above. (DE 39 at14)

Mindful of same national scale revelations, the respondent limited compelled disclosure of itself to the specific locale where the dispute arose. Nevertheless, as regarding the specific locale documents that pertain to genuine issues of material fact and that were placed on the court's record, the same record in its entirety was not

supplied to petitioner by respondent's counsel as required. (Appellant's br. at 8, 17). Moreover, review of the court's record on file shows that omitted/non-supplied documents are inextricably linked and subject to the regional and national plan for the "management of diversity", and diminish the veracity of respondent's defense. (DE 25's gov. Ex. 3 at 30-34; stamped gov. Ex 4,5)

Regardless, the "number one critical element" is nationally applicable and thereby, the district court issued a compelled disclosure order that was erroneous by its over-exclusionary nature. (DE 39 at 7) Additionally, the record shows that respondent placed particular pertinent documents, that were not supplied to petitioner, on the court's record on file after the date that the respondent claims to have come into compliance with the court's disclosure order. (Appellant's br. at 35, 41, 46; "Fax dates") Moreover, as pertaining to the locale of the complaint; "the specific (dis) proportional under-representation and accompanying over-representation, that plaintiff refers to in rebuttal, (ROI, Ex. 4, 8) is manifest." As such, it is shown in DE 24's Gov. Ex. 2 at 13.

As stemming from the facts and the totality of the circumstances; the Federal actor is thereby in effect dictating to petitioner and his like as to which positions that they will be allowed to fairly compete for. And such determinations are made by the respondent's reference and regards to proscribed factors. (Richmond v. Croson)

Mindful that respondent has promulgated that it's affirmative action/preference programs are specifically for diversity for the sake of diversity as opposed to a response to any pattern or practice of unlawful discrimination; petitioner thereby maintains that such purpose, regardless of political consideration, constitutes unlawful grounds for a Federal actor's implementation of such programs. (Croson)

Moreover, how can the Executive assume authority over what by divided and separate power is the authority of Congress; as in making rules for the government. And then

do by directives, policy and programs what Congress itself is prohibited in doing; as in passing any bill that would deny any person equal protection of the laws.

ARGUMENT AMPLIFYING THE REASONS FOR GRANTING THE WRIT

As resulting from the aforementioned complaint and in lieu of the EEOC, the defendant conducted its own investigation of itself and issued its report thereof as prepared by its own contractor. (DE 25's Ex. 1; the ROI)

As contained therein, defendant admits to the occurrence of a "promotion plan violation" and to "your rights as an applicant were violated." And that "we agreed that the park made error when we omitted your name from a certificate;" (Id. at 8, Ex. 20 at 7) (ROI Ex. 1 at 7, Ex. 20 at 4, 7)

The same report goes on to show that the position in question was initially advertised at the GS-7/9 grade levels. (DE 25's Ex. 1; the ROI's Ex. 10 at 1) In response thereto, both petitioner and the selectee applied. (ROI Ex. 15, 16) Thereupon, the defendant found this petitioner to be qualified for the position at the GS-7 level while finding the selectee to be "NOT Qualified (Document Reason)" as in the selectee "lacks qual(ification) of exp(erience) for (grade levels) 6/7/9". It is also specified on this same form; that petitioner is "Qualified" "C"(ompetitively) at the GS- "5/6/7" levels "based on educ(ation)" and "lacks qual. of exp. For 9", and that the selectee is only "Qualified" "C(0mpetitively) (at the GS-) 5 (level)". (ROI Ex. 12)

Thus, the selectee was not qualified for the initially advertised position that subsequently was re-advertised at the lower entry grade level.

Being mindful that this same qualifications determination/evaluation form is completed by the "Personnel Management Specialist", (ROI Ex. 7 at 3, 4, 5) prior to the indisputably unnecessary existence of the

subsequently convened, contrary to policy, rating/ranking scheme panel, (ROI Ex. 9 at 6,7) whose indisputable purpose was to subsequently screen out already known to be qualified applicant(s) as per the illicitly (DE 28's, Gov. Ex. 3, at IV-4-17, Appellant Brief at 10) "...developed...rating guide..." in order to preclude for some their certain referral for consideration for selection and as done via this same directed, "crediting plan", point/score assignment instructions scheme. (ROI Ex. 1 at 6, Ex. 6 at 5, Ex. 20 at 1)

Nevertheless, as per the ROI, Ex.12 form as documenting the Personnel Management Specialist's findings, therein, it is most notable that the basis for the determination of the qualifications of the petitioner is specifically cited. In contrast, for the selectee there is the complete absence of any type of citation as regarding the basis for the determination of her qualifications. Thereby, in context, it can only be inferred that the selectee was listed as qualified, and only at the GS-5 level, as based on experience alone and not, as her application shows, as based on education, as it is lacking.

Additionally thereby, in context and for purposes of consistency it can also be inferred that petitioner was listed as qualified at the GS-5, 6, and 7 levels as based on experience in addition to the specified educational attainment, as it is specified that as pertaining to experience; petitioner only "lacks qual. of exp.for 9".

The above analysis stems from scrutiny that is most apparently absent on the part of the lower courts.[1]

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[1] Moreover, "21. As regarding the rejected plaintiff, as a... competitive eligible, it is notable; that the defendant had previously found plaintiff, to be qualified at the full performance GS-9 level, for this same series but higher full performance grade level:

"Position: Concessions Management Specialist, GS-1101-9/11" job at a different National Park, approximately a year prior to plaintiff's application for subject same series Concessions Management Specialist, GS-1101-7/9 position at ENP.

As regarding the prior referenced form, pertaining to qualification levels, (ROI Ex. 12) it is indisputable that the defendant knew of the qualifications status of the petitioner and selectee, as among the original applicants, prior to this forms completion and prior to the re-advertisement as indicated by the record. (ROI Ex. 7 at 4, 5)

REJECTION

Thereafter, at some point in time prior to the re-advertisement, petitioner's known to be fully qualifying application was incontrovertibly rejected for referral for consideration for selection. Whereas, at no time, nor at any grade level was petitioner's known to be qualified at multiple levels application ever referred to any selecting official for consideration. (ROI Ex. 9 at 8)

Nevertheless, as regarding the initial job vacancy announcement, this rejection only represents the first of the multiple rejections for referral for consideration suffered by petitioner as regarding this same single position.

ARTICULATED REASON FOR REJECTION

As it is specified that: "...the Defendant has met is (its) burden in articulation a...non-discriminatory reason for Plaintiff's non-selection. Based on an objective evaluation, one that applied equally to all promotion eligible candidates, the Plaintiff's numerical rating placed him beneath the cut off for certification." (parenthesis word added) (DE 35 at 12/13)

Nevertheless, as specifically related to petitioner's fully qualifying application and the initial job vacancy announcement, the district court refers to a numerical rating that was not in existence when petitioner was rejected even though he was found to be fully qualified for referral for

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This information is shown in the record on file as contained therein as page 26 of plaintiff's 46 page ENP application..." (ROI, Ex. 15) (Brief of Appellant at 23, 24)

consideration as determined by the defendant via its use of the controlling Office of Personnel Management (OPM) standards of measure, for this continuously existing, as in not subsequently cancelled position that petitioner submitted his application for. (Qualification Standards, Operation Manual, DE 24's Ex. 3)

Thus, the district court is erroneously relying on and referring to an ex post facto and inofficiously designed numerical rating scheme that surfaced, contrary to rules, (ROI Ex. 9 at 5, 6, 7, 8) as a means to illegitimately screen out non-preferred applicants (DE28's GOV. Ex. 3 page IV-4-17; selective factors) and such was applied to the subsequent and distinct job announcement for this same position. This is also to state that the re-advertised position lowered the initial entry grade level and thus the qualification requirements. Moreover, neither the selectee nor this petitioner applied for this newly modified, for purposes of accommodating the lesser qualified, position. (ROI Ex. 10 at 7 and Ex. 7 at 4,5)

Thus, the articulated reason supplied for petitioner's rejection/"non-selection" only came into existence after petitioner's rejection as the record shows.

CIRCUIT COURT AFFIRMATION OF DISTRICT COURT'S DECISION

As contained within the PER CURIAM decision it is stated: "...that under either of the methods employed by the park to decide which applicant's to forward to the selection official for review, Walsh (petitioner) failed to make the cut that would allow him to proceed. (R. 1-25 at Ex. 6 at 12-14)" (Circuit Ct. decision basis at 3)

Thereunder, the circuit court is simply referring, in its "either of the methods employed..." statement, to an alternative form of the same game ex post facto numerical rating scheme, as previously referenced by petitioner, and that was used to evaluate all applicant's that the defendant considered/assumed to be applying for the subsequently re-advertised and newly modified same series position.

Nevertheless, the initial position advertised was still continuously existent and the applications submitted in response to same were still valid and thereby required submission for referral for consideration purposes if the applicants were known to be qualified.

Subsequently, thereby, defendant states: "In determining which candidates to refer to the selecting official, a cut score was established...If one method screens out minorities, women, or other targeted groups, the alternative method is used.

...Method 1 (natural break) was the cut score chosen in lieu of Method 2 (average break) in an effort to promote equal opportunity at the GS-5 grade level. For the GS-6 and 7 grade levels, method 2 (average break) was used.

...Accordingly,...Five applicants (including yourself) were eliminated from being referred to the selecting official..." (ROI, Ex. 20 at 2, 3)

Thereby, Method 1, which is only engaged as concerning preference eligibles, allows for a lower cut score than Method 2. (ROI Ex. 1, Ex. 20) As resulting therefrom these numerical rating schemes; three out of four competitively eligible women were referred for consideration, as only three competitive eligibles are allowed to be referred for consideration under these ex post facto schemes, and all four competitively eligible and qualified men were screened out from referral, (ROI Ex. 14) "in an effort to promote equal opportunity". Nevertheless, petitioner is also seeking prospective relief.

As regarding the GS-6 and GS-7 levels' numerical rating scheme, the district courts report states: "The Plaintiff's ranking also rendered him ineligible for consideration at the GS-6 and GS-7 levels. (M.S.J. Ex. 13 at 4) Under these particular facts, the defendant has met its burden in articulating a. ... non-discriminatory reason for Plaintiff's non-selection." (Underline emphasis added) (DE 35 at 12)

Nevertheless, the record on file is totally devoid of petitioner's "ranking" as pertaining to the GS-6 and 7 levels.

As petitioner was the only competitive eligible that was qualified to be "ranked" at those levels. Unless of course, petitioner is ranked Number 1. Additionally, the same can be said of the prior referenced and subsequent use of "Method 2 (average break)...For the GS-6 and 7 grade ("cut") levels..." as applied to petitioner, as the only qualified competitively eligible for promotion applicant rated and who nevertheless was subject to and/or created the "average ("cut") break", and thereby was retroactively disqualified.

The above is relevant to the defendant's cited Merit Promotion Plan and as stated therein: "All...be rated to ensure...they meet...qualification(s)...Regardless of the number of the applicants, qualitative distinctions must be made among the promotion eligible in terms of relative merit and ability..." (DE 25, Ex. 1 thereto, as the ROI's Ex. 21 at 4 and on missing page 5) and plaintiff's brief at 45. (emphasis added)

Accordingly, the district court was in error when it stated that: "Based on an objective evaluation, one that applied equally to all promotion eligible candidates,..." (DE 35 at 12, 13) as, other than petitioner, there was no "all...candidates" competitively eligible for promotion at the GS-7 level, as out of 19 applicants only the petitioner was competitively ("C") eligible for promotion at the GS-7 level. (ROI, Ex. 12) As in: "Walsh, John J. –Qualified C—5/6/7". (ROI, Ex. 12 form)

Thus, at the GS-7 level: No "qualitative distinctions must be made among the promotion eligible in terms of relative merit and ability..." when there is only one promotion eligible and your purpose is to reduce the qualified applicant pool to the "top three" for "each grade level". (DE 24's Ex. 4, 5—"Top Three", ROI Ex. 5 at 5, 6—"certificate for each grade level")

Moreover:

"Q. At what grade level did he apply

A. He applied at the 7 level…

Q. Okay. And at the 7, at the 6 and 7, Mr. Walsh was the only candidate. Okay.

A. So----." (ROI Ex. 7 at 8, 12)

Additionally, neither the words "objective" nor "equally" are to be found in the record outside of the counsel for the defendant's use and the court's improper and ultimately baseless adoption of same.

Moreover, as regarding the court's errors and thereby, as the prior deposed "GS-13 Personnel Officer" for the approximately 250 employees Park stated: "…in accordance with the merit promotion plan, is if we have less than 10 promotion candidates we just go ahead and refer…after we do the basic quals. We do not go through and rate and rank and/or hold a panel…" (ROI Ex. 9 at 7)

Accordingly, out of 19 total applicants only 8 (including petitioner) were found to be competitively qualified as promotion candidates, and of those 8, excepting petitioner, all were only qualified at the GS-5 level. (ROI Ex. 13 at 1)

Thus, what the court cites as "applied equally" to petitioner is not applicable to petitioner, (DE 35 at 12, 13) and thereby not material for purposes of rejecting petitioner.

Moreover, as pertaining to the court's claimed "objective evaluation", the record does not reveal the designer of the evaluation, nor the author of the following:

"A. The KSA's…listed in the vacancy announcement, (nor) ratings levels…developed for those KSA's (as)…the rating guide…used by…panel…" as the "criteria" that the "candidates were rated against." (ROI Ex. 7 at 7)

Thus, the objectivity of the designer/author of such is not capable of establishment. And the selecting official acknowledges no involvement as: " I was simply given a cert that had names on it." (ROI Ex. 5 at 5) and it cannot be

established that the "criteria" was objectively designed as not to favor any particular protected group or individual member thereof. As the referral for selection results emanating from this criteria evidences the opposite. As in all four competitively eligible and qualified for promotion male candidates were screened out for referral for consideration by the criteria and inofficious selection process.

Thus, the district court is in error when it stated: "...there is no evidence from which a rational fact finder could conclude that the proffered reason for his non-selection; i.e., that Brice possessed superior qualifications based on objective criteria, was in fact based upon a policy designed to discriminate against white males..." (District Court's Report, DE 35 at 16)

Moreover, petitioner maintains that no concluding is necessary, as only a "could find" as based on what is "somewhat less that the preponderance of evidence" is necessary at the summary judgment stage of deliberation. The same applies to the above's "was in fact based". And this immediate matter is primarily about the non-referral for consideration and not necessarily about the ultimate non-selection for the position. As in: "A. No. the selecting official never even received his name, so that wasn't even—he didn't even have the opportunity to consider him. He did not get...on the cert." (ROI Ex. 9 at 8) (emphasis added)

Thereby, petitioner maintains that this in all about equal opportunity and such has been denied petitioner and his like, and that if the identities of the petitioner and the selectee were cross assigned this case would be non-existent.

As also regarding the "objective evaluation", that the court speaks of as in and derived from the locally implemented and controlled scoring instructions/ "KSA definition form"/ "Crediting Plan", which directs the rating panel members on the number of points to assign; such is totally absent from the defendant's controlled Report of Investigation, (ROI; DE 25's Ex. 1) and the record on file.

As such: this absence 1.) indicates most importantly, that the judgments/decisions rendered in this instant case by the lower courts lack foundation as there is no existent underlying basis, as inherently required, from which the courts citation of "particular facts...objective criteria" stems from. And 2.) this absence indicates the absence of good faith on the part of defendant. (ROI, Ex. 1 at 5)

Thereby, the circuit court's reasoning for its decision as in "Walsh failed to make the cut that would allow him to proceed' is simply based on a number, not attested to, and lacking underlying factual basis that thereby precluded the court's establishment/determination of "admissible evidence sufficient to raise a genuine issue of fact as to whether it had a legitimate reason for not hiring plaintiff."
(Circuit Court at 3)

This is to say that on this matter, petitioner is not presenting a fact question to this Court that the lower courts have decided on. Rather, this is to state that the entire basis, for the lower courts decisions, is inherently contingent upon the creation of non-existent in the record "facts". (DE 35 at 12) This is also to state that it is erroneous for the lower courts to devine the existence of material facts that: "explain how the score relates to the experience required":, (ROI Ex. 1 at 5) when such specific explanation has no basis in the record on file as absent therefrom and that their decisions hinge upon. Nevertheless, such specific explanation does exist in the record not on file, as among petitioner's court listed exhibits. (As to petitioner's attempt to put the voluminous content of the actual listed exhibits on file see Appellant's br. at 18)

This is to state that the basis that directs the assignment of the scores is absent from the record and such specifies the multitude of numbers to be granted with specificity in order to arrive at a totaled number as based upon also absent from the record rating criteria. Thereby, what is derived from such absences cannot constitute "admissible evidence sufficient to raise a genuine issue of

fact..." due to insufficiency. Thus the circuit court is in error. Moreover, as previously shown and as revealed in the record, petitioner was not to be made subject, at any time, to the "cut that would" preclude petitioner from proceeding, especially at the GS-6 and 7 levels.

Nevertheless, the lower courts divine the results to be "Based on an objective evaluation, one that applied equally to all..". This occurred even though petitioner made known to the courts, that petitioner was in possession of the controlled rating scheme's explicit directions/instructions that were required to be used by the panel members in their point/score assignments. (DE 39 at 11, 12; Plaintiff's objections to the Court's Report, Appellant's Brief at 13)

Moreover, for this entry level position, it is stated in plaintiff's objections that: "It is also notable, that due to the confines of the defendant designed scoring, that no qualifying for referral credit can be granted for any and all formal education, and virtually no amount of sufficiently qualifying for referral credit can be given for any non National Park Service experience either, regardless of how most pertinent and directly related that experience may be to the position. (See Report, page 12) "Plaintiff...had very similar experience but not specific experience," etc.) (DE 39 at 12; objections) (operative words: entry level and this job was government wide not just NPS wide for applications from.)

To elaborate, as from the testimony of the only panel member who agreed to testify to the defendant's investigator, who also happened to be the only panel member who was qualified sufficiently enough to be considered to be the position "subject matter expert" and who was also the only panel member that granted a sufficient number of points to petitioner for purposes of allowing the referral of petitioner for consideration, he stated that petitioner had: "similar type experience that this job would require but, again, it wasn't the specific experience that the KSA seemed to call for," (ROI EX. 6 at 8) as in the "KSA's" controlling and non-

validated "crediting plan", that the defendant's Report of Investigation selectively omits.

Also, as pertaining to this matter of an "objective rating procedure utilized to assess all candidates equally", (DE 35 at 8; district court's report) plaintiff pointed to a glaring disparity in the assessment findings as revealed by (this only same) panel member who spoke on the record:

A. "...,but I know our scores were pretty much in line all the way through all of the applicants.

Q....panel member B, which is yourself gave (plaintiff) a score of 57, ... A...gave...37, C...gave 38...there's clearly a big gap...(57 qualifies for referral)

A. Okay. I did not recall that." (DE 27, page 9, DE 39, page 8)

Nevertheless, the court claims "insufficient" inference/evidence on this gap matter. (DE 35 at 15) "...context of an EEO investigation this absence of testimony (of other panel members) is specifically referred to as "Adverse Inference"." (appellant Brief at 14, 15) (See "29 CFR Section 1614.108; Investigation of Complaints esp. (3) (I)"

Nevertheless, the Circuit Court goes on to state: "Walsh (petitioner) failed to make the cut that would allow him proceed. (R.1-25 at Ex. 6 at 12-14) In Turnes, we stated that an "employer need only offer admissible evidence sufficient to raise a genuine issue of fact as to whether it had a legitimate reason for not hiring the plaintiff. (admissible: emphasis by petitioner)

As regarding such "ADMISSIBLE evidence" in prior turn petitioner stated: "For false signatures of the panel members see DE 27 at 10...In regards to fact questions arising from false signatures; DE 39 at 9".

Nevertheless, even after acknowledging the false signatures, the district court dismissed same as not "material." (DE 35 at 16)

Thus, petitioner maintains that the lower courts erred again as in regards to the "admissible evidence" used to attest to the actual beliefs of the non-deposed panel members as to whether petitioner should have been allowed to proceed to the referral for consideration stage. Moreover, affidavits from these non-deposed are also lacking, and the testimony of the only deposed panel member, as regarding his direct knowledge of the other panel member's evaluation of petitioner, is in conflict with the evaluation scheme's average of recorded scores, that, as evidenced, are not "material" nor valid for rejection.

Moreover, as regarding the evaluation scheme and its by definition; use of "selective factors" and as stated in the controlling Qualification Standards Operation Manual (DE 24's, Ex. 3): "Selective factors must represent knowledge, skills, or abilities that are essential...and cannot reasonably be acquired on the job during the period of orientation/training customary for the position being filled.: (emphasis added), DE 28, Gov. Ex 3 at IV-4-17, Appellant Brief at 10)

Nevertheless, as regarding this instant case's KSA's, which serve as the screen out device, subject KSA's are indisputably in direct conflict with the above: " and cannot reasonably be acquired" Section as pertaining to this entry level position as the following KSA examples indicate: "...address your experience interpreting concessions management guidelines...monitoring and reviewing concessions publications and brochures for conformance with policies and guidelines...: (ROI Ex., 10 at 2, 8)

This is to state that, for an entry level position, it is absurd to require any applicant to have the overly specific NPS experience that the above demands in order to receive sufficient credit for referral purposes.

In sum, the requirement of "specialized experience" in lieu of "general experience" as a screen out factor is

specifically contrary to the rules. (See petitioner's Petition For Rehearing at 9-14)[2]

Nonetheless, the lower courts, at all times, fail to ever mention or reference the controlling qualification standards, and the district court states that petitioner's claims of violation concerning the "Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures" is wholly devoid of evidentiary support." (DE 35 at 18) Unless of course for preference eligibles; the only "guidelines" that are "uniform" are the results of preferential selection, regardless of the non-qualifications of the selectee.

SELECTEE'S NON-QUALIFICATIONS

Petitioner maintains that the selectee was not qualified for rating/ranking, or for purposes of referral for consideration at any advertised or re-advertised grade level for the subject position.[3]

Thereby, in response to petitioner's initial complaint the following has been stated in regards to the multiple step screening process: "...GS-1101-5/6/7/9 and the merit promotion process: Step 1-...application (is)...determined...qualified in accordance with the Office of Personnel Management's basic qualification requirements.

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[2] "Moreover, it is obvious that the panel's rating criteria instructions, that the court knows are absent from the defendant's controlled ROI and also totally absent from the record, must be incompatible with the controlling qualification standards. See DE 7 at, N1" (*Appellant's Brief at 41)

[3] "In sum, the record of the selectee's background does not conform with the qualification requirements of the position as indicated by the content of the salient record excerpts. Moreover, the customized process used to certify the qualifications of the selectee is invalid, along with the criteria put forth by the defendant for the determination of same." (Appellant's Petition for rehearing at 7)

Step 2-...application (is)...rated and ranked against...(KSA's)... We are unable to provide you with the crediting plan which describes levels of experience because this is considered "examining" material..." (ROI, Ex. 20 at 2)

Thereby, as per "Step-1": some applicants are immediately disqualified thereunder. Accordingly, the applicant does not advance to "Step 2". (ROI Ex.(s) 12,13)

Therein, as concerning the selectee and the GS-5 level and as regarding "Step-1" of the "process"; and it is indicated by the rules and by her application (ROI Ex. 16) that the standard of measure for the determination of qualifications is to be under the "General Experience Requirements" (DE 24's Ex. 3; U.S. Office of Personnel Management, Qualification Standards Operating Manual, Group Coverage Qualification Standard for Administrative and Management Positions, at IV-A-15)

As shown therein it is specified that "3 years (of) General Experience" is required. Therefrom it is also stipulated that: "general experience is 3 years of progressively responsible experience...such experience may have been gained in administrative, professional, technical, investigative or other responsible work. Experience in substantive and relevant secretarial, clerical or other responsible work may be qualifying...Experience of a general clerical nature (typing, filing, routine procedural processing, maintaining records or other non specialized tasks) is not creditable." (DE 24's Ex 3 at IV-A-16)

As pertaining to the above it is specified that at the time of application that the selectee, Ms. Brice, was a "secretary, GS-318-7 Everglades NP" (ROI Ex 14 at 1) and as contained on the selectee's application it is stated: "Job Title-Secretary GS-318-07" and that her prior position up until 11/94 was: "Environmental Education Clerk- GS-303-05" (ROI Ex. 16 at 1)

Additionally, as contained on the narrative section of the application, the selectee describes her, at the time application, position to be that of 'Executive Secretary':.

(ROI, Ex. 16 at 5) Nevertheless, as per the "Roster of Employees" and the "List of Selections", no such title is existent. (ROI Ex. 22, 23) As related thereto it is stated that:

"prior to her selection (she) served as an executive secretary to...Belli, Concessions Department Superintendent at ENP...Belli is the immediate supervisor of...Beneditti, the selecting official..." (Appellee Br. at 21; FN 4)"[4]

Nor did Belli agree to be deposed as suggested by Petititioner and in order to avoid adverse inference. (ROI. Ex. 8 at 13)

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[4] In response petitioner stated "...the title "executive secretary" is inofficious as in: the selectee's self styled title...non existent in the record and in conflict with her actual; "job title of secretary...318 (series) i.e., "secretary OA", (Office Automation) and also not consistent with...prior position as a "clerk...303, (miscellaneous clerk and assistant), Environ. Ed. Clerk", (ROI Ex. 16, at 13, Ex. 17 at 1) [See Qual. Stds Manual at IV-A_16 for non conforming experience as in not creditable for qualifying]

As to "Belli, Concession Department Superintendent, no such title exists on the record, as before he was the "Assistant Superintendent'...Park Manager...Deputy Superintendent"...

As to the "Concession Department", it is non-existent, however, there is a "Division of Concessions Management' at ENP... As to Beneditti; he was the "Chief, Concessions Management, (division) for the four southern parks...'...who is "responsible for direct supervision of one Concessions Aid position..."

Accordingly, there is no "Concessions Department Superintendent at ENP", regardless of the defendant's counsel's claim

As concerning the above, Defendant's footnote 4 at 21 is apparently in response to plaintiff's brief at 54 and as stated therein:

"the Chief, Concessions Management, as per his testimony, gives no indications of the quality of the selectee's alleged to be specific concessions management specialist work while she was working as a secretary to another party and apparently not under his supervision..."

...Defendant's foot note evidences another multifaceted fabrication..."" (Appellant's Petition for Rehearing at 15, 16)

Nevertheless, as concerning the prior referenced "Experience Requirements" as: "general experience is 3 years of progressively responsible experience...such experience... in substantive and relevant secretarial...work may be qualifying as long as it provided evidence of the...(KSA's) necessary to perform the duties of the position..." (DE 24's Ex. 3 at IV-A-16) "...the record is devoid of any real factual indication of selectee's length of a "substantive and relevant" experience as pertaining to this position, and as even the inferences that could be conduced from the record are inconsistent, non-correlated and in conflict with themselves and contrary to other parts of the record. (Pl. brief at 2, 3, 4, 9-17, 19-23, 30, 35-37, 39, 41, 45-54; Pl reply brief at 7-9, 13)" (Petition for Rehearing at 10) Thereby, as regarding the selectee's application, (ROI Ex. 16) no factual indication of time, as expressed in years of required experience is shown.

This is to state that allegedly, the selectee was occupying two separate positions concurrently. Moreover, and importantly, the selectee's application gives no indication of when she commenced her performance of same concessions management specialist duties. Additionally, the selectee gives no indication of the proportion of her time that was dedicated to such duties.

Moreover, as concerning specific KSA's, only one of them is mentioned by the selecting official as regarding the selectee's relevant experience. And as regarding such the selecting official stated that: "She had been working for approximately nine months on incidental business permits" (while serving as a secretary to another.) (ROI Ex. 5 at 7)

Nevertheless, the "nine months" is less than the required "3 years of progressively responsible experience... in substantive and relevant secretarial...work." This is also to state that (KSA's) are plural.

On her application narrative she specifically lists what the rules list as "not creditable" for qualifying.

Thereafter, she separately makes a multiple and redundant list as regarding "Incidental Business Permits...IBP's" etc.

In sum, as regarding the "provided evidence of the (KSA's)..." (DE 24's Ex. 3 at IV-A-16, ROI Ex. 16) and in relation to evidence as: "...All the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. ..." (Blacks 5th Ed. At 498) In relation thereto, the record on file, including it's Report of Investigation, by no means shows that the selectee was qualified. And as regarding such record on file it is more likely than not that a job "FIX" as abundantly evident, occurred.[5]

Thereby, petitioner maintains that the lower courts cannot divine into existence "facts" that are by legal definition non-existent facts, especially when such non-existent "facts" are considered to be material to the lower courts for decision making purposes in the summary judgment proceeding. In sum, the record shows that this instant case screams mendacity and prevarication, some of which petitioner has not ever touched upon and may not get to as it is so pervasive.

THE LAW AND ERRORS OF THE LOWER COURTS AND THE DEFENDANT

The circuit court states that this case is a: "failure-to-hire claim". (at 2) Whereas, petitioner stated that: "this

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[5] Also, the defendant's counsel failed to supply petitioner with the same record on file that it placed on the court's record. Among the non-supplied documents is DE 24's Ex. 3 at IV-A-16 and its reference to "not creditable" experience, additionally, the investigator omitted the Qualifications Standards from his report. Also, as a key point, if the 3 years of experience are gained via secretarial work, they must be "substantive and relevant" as to provide evidence of the KSA's pertinent to the specific position and such is not required when the experience is gained via "general" administrative, professional, etc. work. Also, the selectee had served less than 3 years in said secretary position.

matter is primarily about the referral for selection process and whether or not a "rational fact finder" could find "sufficient evidence" of discriminatory disfavor of plaintiff and/or discriminatory favor by defendant towards the selectee." (DE 39 at 20, emphasis existing)

Additionally, "Nevertheless, defendant virtually ignores that: "this is...the referral for selection process...as the final selection process is a distinct (and distant) issue, as is; the...requirement to hire anyone...as the process is the main issue..." (petition for rehearing at 1)

The circuit court also states: "When the plaintiff relies on circumstantial evidence to establish his claim in a Title VII discrimination case, the district court uses the burden shifting framework established in McDonnell Douglas v. Green..." (underline added, at 2)

As related thereto, the district court states: "Once this initial demonstration under rule 56 (C) is made, (absence of genuine issue) the burden of production, not persuasion, shifts to the nonmoving party." (DE 35 at 4, 5, parentheses added) Thereafter, it is stated that: "The Plaintiff has failed to produce any affidavits, depositions,...or admissions tending to support a reasonable jury verdict in his favor." (DE 35 at 18, underline added) Petitioner responded: "At this juncture...what is relevant is the record on file" (not the file producer or source) (br. at 6).

Nevertheless, the circuit court has previously stated: " Rather, once the defendant has met its burden of production the McDonnell Douglas/Burdine Framework becomes irrelevant; the sole inquiry is whether the plaintiff successfully carries the burden of persuading the trier of fact...Hicks..., 113 S. Ct. at 2747-48..." (underlines added, Walker v. Nation's Bank...11th,...Nos. 93-3380, 94-2134, June 12, 1993, appellant br. at 27)

Thus, the conflicting words in the above are: "uses" v "irrelevant" and "production v. persuading".

The district court has also stated that: "The Plaintiff has not met his burden in proving...reasons pretextual for unlawful discrimination..." (underline added, DE 35 at 18)

The above was advanced erroneously and thereby precluded, unlawfully, petitioner's constitutional right to a jury trial. As in the word "proving" which by legal definition means: "To establish or make certain..." (Black's 5th ed. At 1102) This is to state that by law, it is improper to apply a "proving" standard as regarding summary judgment. As by law, only the showing of the existence of a genuine issue is required as per Anderson v. Liberty Lobby, Inc. 477 U.S. 242 1986, pp. 247-252.

Similarly and erroneously the same court has also stated: "...there is no evidence from which a rational fact finder could conclude...that...reason for his non-selection; i.e. that Brice possessed superior qualifications based on objective criteria...(DE 35 at 16)"...court ...erred in its requirements ...that...fact finder reach conclusion...at this stage. Accordingly,...Anderson v. Liberty Lobby...stated that: "it is true that the issue of material fact required by...56 (c) to be present to entitle a party to proceed (477 U.S. 242, 249) to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the...dispute be shown to require a jury...to resolve...versions of the truth at trial: 391 U.S., at 288-289". (Appellant br. at 8, underline added)

The district court has also stated that: "...the Plaintiff fails to show...discriminatory intent..." (DE 35 at 17, 18, underlines added)

Nevertheless, the same court has also stated that m: "In...discrimination cases based on direct evidence, intent...arises...without...inference..."161 F.3d 1318, 1339 (11th Cir. 1998) In contrast,...claim based on circumstantial evidence, a plaintiff must prove discriminatory motive...Teamsters v. U. S. 431 U.S. 324, 335 n. 15...(1977)." (DE 35 at 6, underline added)

As regarding the court's application of "intent" to petitioner's case, the district court, in context, presented the above erroneously. Moreover, as to "intent" as in it's: "Being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts..." (Black's, 5th ed. At 727)

Nevertheless, the lower courts are in error, at best, by at all times failing to mention, nor reference, nor address petitioner's repeated and emphatic claims of the indisputable existence of **MOTIVE** to discriminate and as put into play by highest levels of the department and as incontrovertible.

Discriminatory Motive and Practices

"...favorable evaluations are reflected on management's performance plans in regards to "diversity" achievements as...found on "form number DI-2002" (Appellant's br. at 3)

As regarding such and as stated in the record on file by petitioner:

"40...Dept. of the Treasury Memo of...Commissioner of the I.R.S., Michael Dolan, in regards to performance plan evaluations specifically pertaining to diversity and the...suspension thereof Issued Aug. 1996..." (DE 18 at 11, and as a response to the Adarand v. Pena decision)

"10...as pertaining to motive; Mr. Beneditti's annual evaluation relates to...success in...affirmative action...preference programs...same can be said with even higher accountability levels for his immediate supervisors." (id.9)...[as from ROI Ex. 8]

12. Lower qualifying "cut score" applicable only for minorities and women. (id, 11)

13. Improper utilization of "applicant's background survey" information during the qualifying for referral for selection process...survey identifies proscribed factors particular to applicants...

14.Exclusionary "skill banks and referral pools" based on proscribed factors. (id. 12)

...As an indisputable fact that a lesser qualified applicant was referred for selection...and plaintiff was rejected for referral (for consideration) (DE 25, at 3, Nos. 5, 8)

Thus, when this material fact is coupled with the at all times indisputable fact; that the supervisor of the selecting official is held to high accountability standards as regarding diversity achievement; it is by definition a genuine issue of material fact under these circumstances. (and as to the non-deposed supervisor made unavailable)...thereupon, connect this with..."Adverse inference"...(as specified) in 29 CFR 1614.108...EEO investigations..."" (Appellant's Br. at 3, 4, which excerpts from ROI. Ex. 8)

Nevertheless, in regards to much of the preceding, which was presented prior to the district courts Report and Recommendation, the district court also states that: "Plaintiff has neither produced evidence nor designated specific facts which, if submitted to a jury, would show the existence of material issues..." (DE 35 at 18)

Petitioner's point here is that, in the above, the operative words are: "if submitted to a jury" and as regarding such, the lower courts, as previously stated, refuse to acknowledge the existence of **MOTIVE**, as the presence of motive under the circumstances of this instant case makes manifest and undeniable the strong potential of the rational jury's': "**COULD**" find for plaintiff.

Thereby, it could be said: that awareness of said potential explains the evasion of the genuine issue.

Prior to the court's Report (DE 35) petitioner had also stated and specifically in regards to motive: "Look at the number one critical element of the performance plan for selecting officials and members of management...this material fact concerning the number one critical element of diversity achievement...can be found in the annual evaluation...relates to success in achieving diversity

goals...the evidence directly proves the fact that...officials have...motive...to favor "women and minorities"...**The "fact" is motive and the fact is a material fact.** (DE 27 at 6, 7)" (br. at 15)

Petitioner has also previously stated that as stated in Teamsters, 431 U.S. 324, 325: "Central focus...is always whether the employer is treating "some people less favorably because of their race...sex..." "...as with the term, "number one critical element, the Report, in its entirety, fails to find plaintiff's use of the word: **MOTIVE**. ...(DE39 at 14) (emphasis original)

"...SCREENING and selecting personnel...process will focus on...EO... special emphasis programs... superintendent's selection process...affirmative action staffing plan...no personnel...offered employment until required review..." (DE 27 at 12, DE 39 at 17 (br. at 16, emphasis existing)

Also, as regarding the selection of supervisory personnel it is required that some be subject to: ""**SCREEN-OUT**" of those perceived to be limited in their ability or "skill in Affirmative Action" (DE 27 at 12, 13)"" (emphasis original)

...Accordingly: "The trial court's function at this juncture is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial."...(br. at 1) (pp. 247-252, Anderson v. Liberty Lobby, Inc., 477 U. S. 242 (1986)"

Additionally, this matter primarily concerns the existence of discrimination <u>prior</u> to the ultimate selection. This is to state that rejection for referral for consideration precludes selection.

Moreover and **MOST IMPORTANTLY**, and as regarding the erroneous and premature requirement for an "intent" <u>conclusional</u> finding, such is misapplied as the <u>HICKS</u> standard controls as in: "The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may,

together with the elements of the prima facie case, suffice to show intentional discrimination" Hicks,--U.S.--, 113 S. Ct. at 2749. (Appellant br. At 27 parenthetical original)

And as also evident is that the defendant did not believe that the rejected petitioner was not sufficiently qualified and that the selectee was qualified as: ""The inquiry into pretext centers upon the employer's beliefs, and not the employee's own perception of his performance. Billet v. CIGNA Corp.,..." (Holifield v. Reno, No. 95-3289, July 2, 1997 at 7)"" (Petition for re-hearing at 3)

Conflicting Eleventh Circuit Decisions

As per "46 Mercer L Rev. 1321" (1994):

> "...in Batey v. Stone. A race discrimination case...failure to promote...plaintiff, a white female...The primary litigation issue concerned the creation of a new position (Fed. Gov.) on the theory (of)...the new job description...On appeal, the Eleventh Circuit Court reversed, finding that a material issue of fact remained as to whether the promotion decision had been undertaken with discriminatory intent. The court found that...since there was evidence in the record that (plaintiff)...was better suited for the new position. In short, the court found that the evidence raised the question as to whether the matrix utilized in filling the...position had been "fixed" to select a predetermined candidate, and thereby favor...(another) over the (plaintiff)."

"In Turnes v. Am South Bank, M.A....Eleventh Circuit reversed...finding that defendant...had no knowledge of this information at the time it rejected plaintiff's application...Accordingly, the court found that plaintiff's prima facie case stood unrebutted..." (ex post facto evidence) As in relation to Turnes, petitioner's record on file shows defendant's "unrebutted" response to present petitioner's 7 (2) (b) complaint. (DE 1 at 2)

As regarding analysis: "Among the most blatant fabrications of evidence lies the following:

"In this case, numerous ENP personnel involved have made sworn statements that neither race nor any AEP or other memoranda or policy either the selection official or the panel members in making the selection...see statement of material facts...plaintiff produces no evidence to refute..."(DE 25 at 18)

In response, plaintiff specifically refuted as follows: "Upon review, the words "AEP (Affirmative Action Plan) or other memoranda or policy" are not be found in their testimony, nor are they to be found in the questions from the investigator/examiner." (DE 27 at 10)

Moreover, no similar or like meaning words are to be found in context. Nevertheless, even after pointing out this genuine issue of material fact, which has great bearing on the ultimate issue, the district court responds: "...because of his own disbelief that "numerous ENP" personnel indicated that...nor any affirmative action plan factored in his non-selection...plaintiff's arguments regarding "inconsistencies" in the record is unconvincing...plaintiff's allegation that there is not evidence of "numerous ENP personnel" stating that neither race, nor any affirmative action plan factored in the decision process, is also refuted by the record. (Benneditti...at 8-9, Perez...at 15, Camp...at 9, Proctor...at 8)" (DE 35 at 14, 15)

The above clearly shows that the defendant has not shown the absence of a genuine issue of material fact that the District Court in "disbelief" apparently refuses to acknowledge. (See DE 39 at 13, 14, 15)

As regarding the federal defendant, the important point here is that there is the presence at the national, southeast regional and local levels of an affirmative action/diversity plan that is inherently based on proscribed factors that are in existence while there is no documentary nor testimonial evidence on file that shows the plan's non-applicability to the subject position in dispute."

(Reply Brief of Appellant at 11, 12)""

In closing, as a citizen and more importantly when petitioner acts on this matter: "he does so not for himself alone; but also as a "private attorney general,: vindicating a policy that Congress considered at the highest priority...(Newman v. Piggie Park Enterprises, 390 U.S. 400, 1968,) (Appellant's Motion for the allowance of more than 15 pages as concerning the petition for rehearing, at 2).

Thereby, I find that the distortions and inaccuracies, as especially concerning the facts of this instant case and as presented in the REPORT AND RECOMMENDATION ON THE MERITS OF PLAINTIFF'S CASE, (DE 35), to be unconscionable and as to be so numerous as to be unmentionable in their entirety.

As to the circuit court, its citation of Cofield v. Goldkist as the controlling precedent is so inexplicable as to be implausible. In sum, a classic case of selectively omissive reasoning. And finally, petitioner maintains that abuse of process is the hallmark means by which the practitioners of the "process" implement the achievement of the "essential and critical to the (defendant's) mission": "diversity".

In conclusion: "[D]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by congress is the removal of artificial, arbitrary, and unnecessary barriers to employment...Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox...provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes...also practices that are fair in form, but discriminatory in operation..." (Griggs v. Duke Power Co., 401 U.S. 424 (1971 at 4) (Petition for Re-hearing at 18).

In God We Trust
Respectfully Submitted,

John J. Walsh

Supreme Court, U.S.
FILED
03-998 AUG 20 2003
OFFICE OF THE CLERK

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-12498
Non-Argument calendar

D.C. Docket No. 00-08862-CV-KLR

JOHN J. WALSH,

Plaintiff-Appellant,

Versus

SECRETARY OF THE DEPARTMENT OF INTERIOR,
Gale Norton,

Defendant-Appellee

Appeal from the United States District Court
For the Southern District of Florida

(January 10, 2003)

Before BLACK, MARCUS, AND COX, Circuit Judges.

PER CURIAM:

John J. Walsh, proceeding pro se, appeals the district court's grant of summary judgment in favor of the Department of the Interior ("Department") on his failure-to-hire claim brought under 42 U.S.C. –2000e-16. Walsh claimed that the Department failed to hire him because of his race (white), sex (male), and age (over 40). The district court found that while there was a prima facie case of discrimination, Walsh failed to establish that the Department's legitimate non-discriminatory reason for failing to hire Walsh was pretextual. We affirm.

This court reviews a district court's grant of a motion for summary judgment de novo, viewing all evidence and factual inferences in the light most favorable to the nonmoving party. *Turnes v. Amsouth Bank, N.A.*, 36 F.3d 1057, 1060 (11th Cir. 1994). When the plaintiff relies upon circumstantial evidence to establish his claim in a Title VII discrimination case, the district court uses the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 4411 U.S 792, 802, 93 S. Ct. 1817, 1826 (1973). Under the framework, once a prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the challenged action. *Id.* If the employer does so, then the burden shifts back to the plaintiff to establish that the proffered reason is pretextual, *Id.* at 804, 93 S. Ct. at 1825.

In this case, the Department conceded a prima facie case and then proffered a non-discriminatory reason for not hiring Walsh: he was not the most qualified candidate for the job. (See R.1-25 at Ex. 13 at 4, 7, 12.) Furthermore, Raquel Perez, the Personnel Management Specialist at the Everglades National Park, made a sworn statement that under either of the methods employed by the park to decide which applicants to forward to the selecting official for review,

Walsh failed to make the cut that would allow him to proceed. (R.1-25 at Ex. 6 at 12-14) In *Turnes,* we stated that an "employer need only offer admissible evidence sufficient to raise a genuine issue of fact as to whether it had a legitimate reason for not hiring the plaintiff." 36 F, 3d at 1061. We agree with the district court's conclusion that the Department established a legitimate, non-discriminatory reason for failing to hire Walsh.

Having established a legitimate, non-discriminatory reason for failing to hire Walsh, the burden shifts to Walsh to establish that the proffered reason is pretextual.

Walsh argues that he is more qualified than the younger, black female chosen for the position and that his superior qualifications establish pretext. When arguing that disparity in qualifications establishes pretext, we have stated that the plaintiff must "adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001), quoting *Denney v. City of Albany,* 247 F.3d 1172, 1187(11th Cir. 2001). We have examined the briefs and the record, and we do not find such a disparity in this case.

We affirm the district court's grant of summary judgment in favor of the Department. We deny Walsh's request that we grant declaratory relief and issue a writ of mandamus.

AFFIRMED.

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

Case No. 00-8862-CV-RYSKAMP

JOHN J. WALSH,
Plaintiff,

-vs.-

GALE NORTON, SECRETARY OF THE DEPARTMENT OF THE INTERIOR,
Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE comes before the Court upon this Court" Order Granting Defendant" Motion for Summary Judgment. Considering this Court's order, an entry of final judgment is now appropriate. It is therefore

ORDERED AND ADJUDGED that **FINAL JUDGMENT** be and the same is **HEREBY ENTERED** for Defendant and against Plaintiff. The Clerk of the Court shall CLOSE **THE CASE** and **DENY** all pending motions as **MOOT.** This Court reserves jurisdiction to consider motions for attorneys fees and costs and any other post-judgment motion.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 8 day of March, 2002.

s/_____
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
Marilynn K. Lindsey, AUSA
John J. Walsh, pro se, 942 Marlin Circle, Jupiter, Fl.33458

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

Case No. 00-8862-CV-RYSKAMP/VITUNAC

JOHN J. WALSH,
Plaintiff,

-vs-

GALE NORTON, SECRETARY OF THE DEPARTMENT OF THE INTERIOR,
Defendant
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE came before the court upon the Report and Recommendation [DE35] issued by Magistrate Judge Ann E. Vitunac on February 20, 2002.

The Court has considered the Report, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED THAT United States Magistrate Judge Ann E. Vitunac's Report and Recommendation [DE 35] is hereby **RATIFIED, AFFIRMED,** and **APPROVED.** Accordingly, Defendant's Motion for Summary Judgment [DE 25], filed December 3, 2001, is **GRANTED.** Final judgment shall be entered by separate order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, the 8 day of March, 2002.

S/_____
KENNETH L RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
The Honorable Anne Vitunac
Marilynn K.Lindsey, AUSA
John J. Walsh, pro se, by mail,
942 Marlin Circle, Jupiter, Fl. 33458

Appendix C/2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 00-8862-Civ-Ryskamp/Vitunac

JOHN J. WALSH, *pro se,*
Plaintiff,

Vs.

GALE NORTON,
SECRETARY OF THE DEPARTMENT
OF THE INTERIOR,
Defendant.
_____/

REPORT AND RECOMMENDATION ON THE MERITS OF PLAINTIFF'S CASE

THIS CAUSE is before the Court on an Order of Reference (DE 11) from District Judge Kenneth L. Ryskamp filed on October 31, 2000, directing this Court to "take all necessary and proper action required by law and/or submit a Report and Recommendation to this Court." Pending before the Court is Defendant's Motion for Summary Judgment (DE 25). This Court has reviewed the Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment filed December 21, 2001 (DE 27); Defendant's Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment filed January 27, 2002 (DE 32). The matter is now ripe for review.

1. BACKGROUND

A. Plaintiff's Complaint

Appendix D

The Plaintiff's employment discrimination complaint (DE 1) alleges that he was discriminated against on the basis of race, gender and age. (Compl.at 2) In particular, the Plaintiff alleges that the Defendant engaged in discrimination by "unlawfully select[ing]...a measurably lesser qualified, and known to be prior to re-advertisement, non-qualified applicant of a different race, gender, and lesser, (under 40 years), age category" applicant for a concessions management position. (See id. at 3) The specific relief sought by the Plaintiff is that he be promoted and that the Defendant be enjoined from further acts of alleged discrimination. (See id at 4) In addition, the Plaintiff requests that the "current notorious profiled constituency placement program(s)...commonly known by the amorphous terms of Affirmative Action/Diversity/Special Emphasis" be "supplant[ed]" by "the Congressionally mandated, constitutionally sanctioned and individually oriented merit system and very limited Veteran's Readjustment principles and programs." (See id.)

B. Defendant's Motion for Summary Judgment

In its Motion for Summary Judgment (DE25), the Defendant argues that the Plaintiff has failed to rebut its legitimate non-discriminatory reasons for its employment decision. (M.S.J. at 14). The Defendant alleges that it is entitled to judgment as a matter of law because the Plaintiff, as the nonmoving party, fails to make a sufficient showing of an essential element to its claim of unlawful discrimination, to which he bears the ultimate responsibility under the Title VII burden shifting analysis. In particular, the Defendant argues that the Plaintiff fails to show that the proffered

reason for his non-selection was a pretext for unlawful discrimination. (See id. at 15.)

C. Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment

In Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment (DE 27), it is alleged that there are genuine issues of material fact precluding the entry of summary judgment. In support of his motion, the Plaintiff asserts that certain alleged "inconsistencies" in the record, coupled with an alleged "error" in the panel review process, constitute proof of an intent to discriminate. According tot he Plaintiff, the Defendant adhered to a broad based affirmative employment plan, that "alone and/or with prior introduced evidence" proved to be a pretextual, and ultimately dispositive, consideration.

D. Defendant's Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment

In its Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment (DE 30), the Defendant asserts that the "inconsistencies" referenced by the Plaintiff are not actual inconsistencies and, in any event, do not satisfy his burden in demonstrating the existence of any issue of material fact. (Reply M.S,J. at 1) The Defendant alleges that the Plaintiff's arguments, taking singly or cumulatively, fail to create "even a scintilla of evidence" supporting his claim that the legitimate, non-discriminatory reasons proffered by the Defendant were a pretext for race, age and gender discrimination. (See id at 5.)

E. Plaintiff's Reply to Defendant's Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment

In his Reply to Defendant's Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment (DE 32), the Plaintiff reiterates his previously raised arguments that genuine issues of material fact exist, thereby precluding summary judgment in favor of the Defendant.

II. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the court is to construe the evidence in the light most favorable tot he non-moving party. Arrington v. Cobb County, 139 F.3d865, 871 (11th Cir. 1998) Summary judgment can be entered only if it is shown "that there is not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.Civ.P.56[c].[1]

The Supreme Court has articulated the standard of review in summary judgment motions:

[T]he plain language of Rule 56[c] mandates the entry of summary judgment, after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof of trial. In such a situation, there can be no genuine issue as to any material fact, since the complete failure of

[1] Federal Rule of Civil Procedure 56[c] provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."

proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Celotex Corp. v. Catrett, 477 U.S.317, 322-23, 106 S.Ct. 2548 (1986).

The party seeking summary judgment has the initial burden of informing the court of the basis for the motion and of establishing, based on relevant "portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,'" that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Celotex, 4767U.S. at 323, 106 S.Ct. 2548. Once this initial demonstration under Rule 56[c] is made, the burden of production, not persuasion, shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [his or her] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324, 106 S.Ct. 2548, see also Fed. R. Civ. P. 56(e). In meeting this burden the nonmoving party "must do more that simply show that there is a metaphysical doubt as the material facts." Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,86, 106 S.Ct. 1348 (1986). That party must demonstrate that there is a "genuine issue for trial." Fed. R. Civ. P. 56[c]. The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby Inc, 477 U.S. 242, 249-50, 106 S.Ct. 2505 (1986) (citations omitted). A dispute about a material fact is genuine if there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary may be granted."

Anderson, 477 U.S. at 249-50, 106 S.Ct. 2505. Although summary judgment should be granted with caution in employment discrimination cases, there are occasions when should disposition is appropriate. See, e.g., Theard v. Glaxo, 47 F.3d 676, 680 (4th Cir. 1995) ("Since the evidence was not sufficient for a reasonable jury to have concluded that Glaxo's decision not to promote Theard was wrongfully based on race, entry of summary judgment [for the employer] was justified.")

B. Title VII and ADEA

Under Title VII, it is unlawful "for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race...[or] sex." 42 U.S.C. ss2000e-2(a)(1). The Age Discrimination I Employment Act ("ADEA") proscribes similar treatment on the basis of age. See 29 U.S.C. ss623(a)(1).

Title VII liability based on disparate treatment requires proof of discriminatory intent either through direct or circumstantial evidence. See Equal Employment Opportunity Commission v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286(11thCir.2000)(citing Harris v. Shelby County Board of Education, 99 F.3d 1078, 1083(11th Cir. 1996)). In Title VII discrimination cases based on direct evidence, "the existence of discriminatory intent behind the employment decision [arises] without any inference or presumption." Standard v. A.B.E.L. Servs.Inc. 161 F.3d 1318, 1330 (11thCir.1998). In contrast, in title VII discrimination claim based on circumstantial evidence, a plaintiff must prove discriminatory motive under a burden-shifting framework.

See International Brotherhood of Teamsters v. United States, 431 U.S. 324,335n. 15,97 S.Ct. 1843, 1854n, 15(1977). Under this analysis, the Plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. See Texas Dep't Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981). In order to establish a prima facie case of failure to promote a Plaintiff must show that: "(1) that he is a member of a [protected class; (2) that he was qualified for and applied for the promotion; (3) that he was rejected; and (4) that other equally or less qualified employees who were not members of the protected class were promoted."
Combs v. Plantation Patterns, 106 F.3d 1519, 1539n. 11 (11th Cir. 1997) citing Wu v. Thomas 847 F. 2d 1480, 1483 (11th Cir. 1988)).

One the Plaintiff proves this prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. See Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997) (citing Burdine, 450 U.S. at 248). If this requirement is met, the Plaintiff bears the ultimate burden of proving the reason to be a pretext for unlawful discrimination. See id. at 1565; Combs, 106 F 3d at 1528.

The burden shifting framework applicable to Title Vii claims based on circumstantial evidence also applies to claims of discrimination under the ADEA. See Cofield v. Goldkist, Inc., 267 F.3d 1264, 1268 n. 6 (11th Cir. 2001) (internal citations omitted).

111. ANALYSIS

A. Whether the Plaintiff establishes a prima facie case of discrimination

In his Employment Discrimination Complaint, the Plaintiff alleges that the Defendant discriminated against him based on his race, gender, and age, by "unlawfully select[ing]" a "measurably lesser qualified" applicant for a merit promotion position as a concessions management specialist. (Compl. At 3.) Defendant concedes that the Plaintiff satisfies his initial burden of establishing a prima facie case based on race, gender, and age discrimination. (M.S. J. at 15.) In particular, the accepted allegation for the investigation and processing of Plaintiff's complaint was as follows:

You were discriminated against on the bases of race (white), sex(male) and age (over 40) when you were not selected for the position of Concessions Management Specialist, GS-1101-05/07/09, vacancy announcement number Ever-97-15, at Everglades National Park. (You became aware in November of 1997). (M.S.J. Ex. 5 at1). Plaintiff is a white male who was forty-seven (47) years old at the time of his alleged claim of discrimination. He applied for a concessions management specialist position originally advertised at the GS-1101-07/09 level. (M.S.J.Ex. 10 at 1-5) Only two applicants, the Plaintiff and Patricia Goodman, a white female over 40 years of age, met the minimum qualifications at this level. (M.S.J. Ex. 12 at 1.) Said position was re-advertised at the GS-05/07/09 level. (M.S.J. Ex. 10 at 7) The position was re-advertised in order to increase the pool of eligible candidates. (Perez 9/15/98 Dep. At 4-5) The promotion eligible candidates were ranked by a three member rating panel consisting of Peter Allen (white, male, age unknown), Louis Penna (Hispanic, male, over 40 years of

age), and Monte Camp (white, male, over 40 years of age). (Perez 9/15/98 Dep. At 5) The candidate ultimately selected is a black female under the age of 40. (M.S.J. at para. 8.)

B. Whether the Defendant articulates a legitimate, non-discriminatory reason for Plaintiff's non-selection

Once a Plaintiff establishes a prima facie case of discrimination, the burden shifts to the Defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. See Holifield, 115 F. 3d at 1564. The Defendant, while conceding that the plaintiff establishes a prima facie case of discrimination, contends that it has articulated legitimate, non-discriminatory reasons for his non-selection. (M.S.J. at 15) In particular, the Defendant claims that Plaintiff's non-selection was based entirely on an objective rating procedure utilized to assess all candidates equally. (M.S.J. at 18)

According to Henry C. Benedetti, the selecting official responsible for making the ultimate hiring decision, Cherri Brice was chosen because of her superior background and specific job related experience. (Benedetti 9/15/98 Dep. At 6.) In particular, Benedetti states that Brice's experience with incidental business permits and concessions contracts, coupled with her insurance industry background and visitor experience, provided the basis for her selection. (Benedetti 9/15/98 Dep. At 6-8) Benedetti states that race, gender and age were non-factors in the selection review process. (Benedetti 9/15/98) Dep. At 8-9.)

Raquel Perez, the Personnel Management Specialist responsible for processing the concessions management vacancy announcement, states the position was advertised at the 7/9 grade level, but later re-advertised at the 5/7/9 level in order attract a larger pool of applicants. (Perez 9/15/98 Dep. At 4.) Perez states that the Plaintiff's application was not processed for further review because his rank and rating

under both the "natural" and "average" cutoff methods rendered him ineligible for referral to the selecting official. (Perez 9/15/98 Dep. at 14.) In addition, Perez states that information pertaining to each applicant's race, sex and age did not factor in their rating and evaluation. (Perez 9/15/98 Dep. At 16)

Monte D. Camp, one of the three panelists, states that the applicants' qualifications were individually assessed. (Camp 9/15/98 Dep. At 4.) Camp states that the panel did not convene until after the applicants were all evaluated. (Camp 9/15/98 Dep. At 4.) Camp states that the panel gave no consideration to race, sex or age in the review process. (Camp 9/15/98 Dep. At 4) Camp neither conferred with the Plaintiff nor with the selecting official prior to the ultimate selection. (Camp 9/15/98 Dep. At 4.)

Valerie Proctor, Personnel Officer at Everglades National Park, met with the Plaintiff to discuss his non-selection. (Proctor 10/30/98 Dep. At 4.) Proctor alleges that a procedural error was made in the applicant review process and the panel should not have convened in order to rate the fewer than ten promotion eligible candidates. (Proctor 10/30/98 Dep.At 7.) However, Proctor states that neither race, sex or age played any role in the evaluation process. (Proctor 10/30/98 Dep. At 8) Proctor states that "as a corrective action" for the alleged error, the Plaintiff was offered an informal resolution agreement wherein he was offered priority consideration for the next available concessions management position. (Proctor 10/30/98 Dep. at 6.)

The informal resolution agreement was reduced to writing and presented to the Plaintiff on March 18, 1998. (M.S.J.Ex.20 at4-6.) The specifics of the offer were that the Plaintiff would be afforded priority consideration for the next concessions management specialist position at Everglades

National Park at the GS-1101-5/6/9 and GS-1101-12 levels. (M.S.J.Ex.20at 4-5.) Under this framework, the supervisors would be under an affirmative obligation to fully document their reasons in the event the Plaintiff were not selected. (M.S.J.Ex.20at4.) The Plaintiff rejected this offer and instead submitted his own "counter offer" on March 23, 1998.[2] (M.S.J. Ex. 1 at 10-11.)

On January 12, 1998, Proctor wrote a letter to the Plaintiff detailing the process in evaluating applicants for the concessions management position. (M.S.J. Ex. 20at1-3.) In the letter, it is explained that all applicants were rated and ranked according to their relative scores on the four "knowledges, skills and abilities [KSA's]." In particular, the KSAs were identified as follows:

(1)knowledge of the guidelines for handling incidental business permits, limited use permits, and concessions permits;(2)knowledge of concessions contract administration principles and practices to monitor concessioner performance and solve problems; (3)ability to review and analyze concessioner rate requests and prepare recommendations for approval/disapproval (address your experience performing rate comparability studies); and (4) ability to communicate orally and in writing (address your experience interpreting concessions management guidelines; investigating complaints and preparing replies; monitoring and reviewing concessions.(M.S.J. Ex. 20 at 1-2.)

Each KSA had five possible point totals which ranged from 0 points for "No evidence of KSA" to the highest score for "Experience at Level 4." The first three KSAs had a weight factor of 5, while the fourth KSA had a weight factor of 4.

[2] The specific relief requested by the Plaintiff was that he be "considered to be equal to and thus treated as a member of any and all groups that receive the benefit of Affirmative Action programs for purposes of hiring, training, retention and upward mobility opportunities."

Each panel member was required to individually list the KSAs on a separate evaluation summary. The procedure used to refer the top ranking promotion eligible candidates to the selecting official undertook two distinct approaches. Under the "natural break" cutoff method, a score was established at the greatest differential between two consecutive candidates. Under the "average break" method, the cutoff point equaled or exceeded the total of all the KSAs at Level 3.

Significantly, under both methods, the Plaintiff failed to establish the requisite rank necessary to qualify for further review. The evaluation summaries indicate that there were eight qualified applicants for the position at the GS-5 who were referred to the three-member panel. (M.S.J. Ex. 12)

Of the eight candidates reviewed by the panel, the Plaintiff ranked number four and was not referred to the selecting official.[3] The Plaintiff received an averaged score of 44 from the respective panelists, placing him beneath the cutoff scores under each distinct ranking method considered by the Defendant. (M.S.J. Ex. 13 at 3) Under the "natural break" approach, the cutoff points occurred between candidate Linda Nommensen's average score of 54 and the Plaintiff's average of 44. Under the "average break" method, the cutoff point occurred at a rating that equaled or exceeded the total of all the KSAs at Level 3, which corresponded to a score of 57. The National Park Service utilized the "natural break" method as this formulated a greater applicant pool from which to make its selection. In contrast to the Plaintiff's mid-ranking score, the selectee received the highest rank at the GS-5 level from all panelists.(M.S.J. Ex. 13 at 4,7,and 10)

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[3] The promotion eligible candidates rated and ranked by the panel included George Bell, Lisa M. Bourne, Cherrie a. Brice, Leon L. Daniels, Harriet D. Freeman, Joseph L. Herring, Linda L. Nommensen and John J. Walsh.

In commenting on the Plaintiff's relative qualifications and job experience, panelist Peter Allen stated that he had "[n] o experience in NPS, concessions, hospitality." In contrast, Brice, who received 24 more points than Plaintiff, had "[g]od agency customer service exp.-some concessions exp." (M.S.J. Ex. 13 at 7.) Finally, panelist Louis Penna, who did not provide comments, nevertheless rated Brice 26 points higher than the Plaintiff. 9M.s.j. Ex. 13 at 10.) After these evaluations were completed, each competitive eligible candidate's numbers were averaged in order to arrive at a final ranking. The scores were 64;58; 54;44;43;41;34; and 27. M.S.J. Ex. 13 at 13.) The Plaintiff's score of 44 placed him beneath the cutoff point under the "natural break" as well as "average break" methodological approaches. The Plaintiff's ranking also rendered him ineligible for consideration at the GS-6 and GS-7 levels. (M.S.J. Ex. 13 at 14.)

Under these particular facts, the Defendant has met is burden in articulating a legitimate, non-discriminatory reason for Plaintiff's non-selection. Based on an objective evaluation, one that applied equally to all promotion eligible candidates, the Plaintiff's numerical rating placed him beneath the cutoff for certification. As explained by the Eleventh Circuit, "it is not the role of federal courts to second-guess the hiring decisions of business entities." Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th cir. 1984). Indeed, the proffered reason by an employer ""does not have to be a reason that the judge or jurors would act on or approve" but rather must simply be one that is non-discriminatory in nature. Id. (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n. 6(1st Cir. 1979). The Defendant sufficiently demonstrates that the Plaintiff's non-selection was based on legitimate, non-discriminatory reasons.

C. Whether the Plaintiff has shown pretext sufficient to demonstrate a genuine issue of material fact as to the veracity of the employer's legitimate, non-discriminatory reasons.

Where, as here, the Defendant produces a legitimate, non-discriminatory reason for the challenged employment action, the Plaintiff bears the ultimate burden of proving the proffered reason to be a pretext for unlawful discrimination. See Burdine, 450 U.S. at 256, 101 S.Ct. at 1095.

In the instant case, the Plaintiff offers no direct proof to support his title VII discrimination claim. Instead, he relies of circumstantial evidence in the form of "inconsistencies" in the record and a disputed irregularity in the selection process, to support his claim of pretext. First, the Plaintiff contends that his rebuttal testimony was not referenced in the Defendant's motion for summary judgment, and that therefore an issue of material fact arises.[4] The Plaintiff alleges that the "circumstances", "definition" and "context" of the term "selecting official" evidences an additional factual issue. (See id. at 3-4.) The Plaintiff alleges that Benedetti's testimony is inconsistent as to whether he reviewed each application. (See id. at 4.) According to the Plaintiff, an additional material issue arises because the Defendant failed to specifically reference his June 5, 2001, deposition testimony. (See id. at 5) the Plaintiff indicates that language contained in a letter sent to him on January 12, 1998, from Everglades National Park, further evidences an issue of material fact.[5] As the Plaintiff

[4] Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment at 1-2.

[5] In particular, the Plaintiff references Step 4 of the applicant review process which provides that: "In determining which candidates to refer to the selecting official, a cut score was established (refer to attachments 5 and 6). If one method screens out minorities, women, or other targeted groups, the alternative method is used." (M.S.J. Ex. 20 at 2)

sees it, evidence of pretext is found by the "totality of the circumstances" coupled with his own testimony that the selecting officials' "adherence to diversity is a very important factor." (See id. at 6-7) According to the Plaintiff, an additional issue of material fact arises because of his own disbelief that "numerous ENP" personnel indicated that neither race, nor any affirmative action plan factored in his non-selection. (See id. at 7) In addition, the Plaintiff states that since one of the panel members, Monte D. Camp, rated him higher than the other panelists, this evidences his eligibility for referral, or, in the alternative, placement on the certification list. (See id. at 8.) Next, the Plaintiff cites as evidence of pretext the fact that panelist Penna provided no comments as to his particular qualifications, and that therefore an "adverse inference" was created. (See id. at 10.) Plaintiff maintains that the panel review process was inherently flawed as evidenced by the "apparently false" signatures on the evaluation summaries. (See id.) As additional "proof" that material issues of fact exist, the Plaintiff alleges that by not including his name for certification to the selecting official, this effectively constituted a "rejection" of his application. (See id at 11.) Plaintiff further contends that the Defendant implemented an Affirmative Employment Plan "policy" designed to specifically favor minority applicants (See id at 12-13) Finally, the Plaintiff argues that an issue of material fact is present because the Defendant allegedly failed to comport with EEOC guidelines on employee selection procedures. (See id. at 13-14.)

Plaintiff's argument regarding "inconsistencies" in the record is unconvincing. The Plaintiff fails to provide evidence of pretext. The fact that the Defendant did not reference Plaintiff's rebuttal testimony, or his June 5, 2001, deposition testimony, does not conclusively demonstrate the existence of material fact. Notably, the Plaintiff fails to state what

portion, if any, of this testimony would refute the veracity of the Defendant's legitimate, non-discriminatory reasons. The Plaintiff's challenge to the identity of the "selecting official" is similarly unavailing given that his non-selection was done entirely by the reviewing panel. (M.S.J. Ex. 13 at 13.) Benedetti's initial testimony that he "reviewed the applications submitted to him and interviewed each applicant" is entirely consistent with his later that he did not have access to the applications. This evidence simply denotes that Benedetti did not review the application of the Plaintiff, or any other person whose name was not on the certificate list. (Reply M.S.J. Ex. 1.) Plaintiff's allegation that there is no evidence of "numerous ENP personnel" stating that neither race, nor any affirmative action plan factored in the decision process, is also refuted by the record. (Benedetti 9/15/98 Dep. at 8-9; Perez 9/15/98 Dep. at 15; Camp 9/15/98 Dep. at 9; Proctor 10/30/98 Dep. at 8.) The Plaintiff's argument concerning the relative disparity in the score given to him by Monte D. Camp and those given by the other panelists, provides an insufficient basis upon which to infer discrimination. The Plaintiff's uncontroverted average score of 44 rendered him ineligible for further consideration under both cutoff scores considered by the Defendant. (M.S.J. Ex. 13 at 13.) The Plaintiff fails to show how the lack of commentary from panelist Penna as to his particular qualifications creates an "adverse inference", much less support for a claim of unlawful discrimination. It is undisputed that Penna provided no comments as to any of the promotion eligible candidates. (M.S.J. Ex. 13 at 10.)

Likewise, the Plaintiff fails to show how the "apparently false" signatures on the evaluation summaries present any evidence that he was treated, or his skills ere assessed, any differently from any of the other candidates. In particular, the documents referenced by the Plaintiff all

correspond to the evaluation summary completed by Personnelist Raquel Perez, who apparently wrote the names of the panelists in the space providing for their signatures. (M.S.J. Ex. 13 at 1,2,3, and 13.) However, Perez was not one of the three panelists involved in the actual evaluation process. It is undisputed that the numerical ratings given by the panelists correspond to the final ranking as reported in the evaluation summary by Perez. Accordingly, the Plaintiff fails to show that the "apparently false" signatures on the evaluation summary gives rise to an issue of material fact.

Concerning Plaintiff's argument that an affirmative employment plan was used in his particular employment decision, there is no evidence from which a rational fact finder could conclude that the proffered reason for his non-selection; i.e., that Brice possessed superior qualifications based on objective criteria, was in fact based upon a policy designed to discriminate against white males over the age of 40. The Plaintiff asserts that not including his name in the certification to the selecting official "unlawfully disfavor[ed] against him. However, even assuming arguendo that a procedural error was made and that the panel should not have convened, the Plaintiff fails to show that the Defendant acted with discriminatory intent. The Defendant's effective policy regarding the rating/ranking of each applicant is stated as follows: All applicants will be rated to ensure that they meet the qualification requirements, as described in the vacancy announcement. Applicants must meet all qualification requirements by the closing date of the announcement. Regardless of the number of applicants, qualitative distinctions must be made among the promotion eligible in terms of relative merit and ability. (M.S.J. Ex. 21 at 4) (emphasis added)

The Defendant indicates that the rating procedure continues as follows:

"If there are more than 10 candidates eligible, a formal rating schedule must be developed or an automated ranking process will be used. Use of a rating/ranking panel is optional...If there are 10 or fewer [candidates], a determination as to "well qualified" must be made."[6] (M.S.J. at 8, n. 5)

Even assuming that the Defendant erred in convening a panel to review the eight promotion eligible candidates, this alleged deficiency affected all candidates equally and Plaintiff fails to demonstrate that such action was a pretext for unlawful discrimination. See, e.g., Langerman v. Thompson, 155 F. Supp.2d 490,498 (D.Md.2001) ("To the extent any deficiencies in the selection process existed...[t]here is absolutely no evidence that the selection process was designed to, or in fact did, discriminate against white men in general or Plaintiff in particular because he is a white male.");see also, Mitchell v USBI Company, 186 F. 3d. 1352, 1355-56(11th Cir. 1999) ("Standing alone, deviation from a company policy does not demonstrate discriminatory animus.") Finally, Plaintiff's conclusory allegation that his non-selection establishes a violation of the Equal Employment Opportunity Commission's "Uniform Guidelines Selection Procedures" is wholly devoid of evidentiary support.

The Plaintiff has not met his burden in proving the Defendant's legitimate, non-discriminatory reasons pretextual for unlawful discrimination. Plaintiff has neither produced evidence nor designated specific facts which, if submitted to a jury, would show the existence of material issues of fact that the Defendant acted with discriminatory intent. This Court has examined all of the evidence presented by the Plaintiff, and considering the evidence in the light most favorable to the nonmoving party, this Court finds there

[6] The referenced text was not however produced for this Court's review and appears to have been inadvertently omitted.

to be no genuine issue of material fact as to whether the Defendant discriminated against the Plaintiff. The Plaintiff has failed to produce any affidavits, depositions, answers to interrogatories, or admissions tending to support a reasonable jury verdict in his favor. Thus, based on the merits of Plaintiff's case, the Court concludes that the Defendant is entitled to summary judgment.

IV. RECOMMENDATION

For these reasons, it is hereby RECOMMENDED as follows: (1)Defendant's Motion for Summary Judgment (DE25) should be GRANTED.

Any party may serve and file written objections to this Report and Recommendation with the Honorable Kenneth L Ryskamp, within ten (10) days after being served with a copy. See 28 U.S.C.ss636(b)(!)(C). Failure to file timely objections may limit the scope of appellate review of factual findings contained herein. See United States v. Warren, 687 F 2d 347, 3348 (11th Cir. 1982) cert denied, 460 U.S. 1087 (1983).

DONE AND RECOMMENDED in Chambers at West Palm Beach in the Southern District of Florida, this 20 day of February, 2002.

S/_____
ANN E. VITUNAC
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Kenneth L. Ryskamp
John J. Walsh, pro se
Marilynn K. Lindsey, AUSA (Ft. Lauderdale)

IN THE UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12498-HH

JOHN J. WALSH,

Plaintiff-Appellant

Versus

SECRETARY OF THE DEPARTMENT OF INTERIOR,
Gale Norton,

Defendant-Appellee

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, _____F.2d____).

Before: BLACK, MARCUS, and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

S/_____
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

IN REPLY REFER TO:
FNP-98-080

Mr. John J. Walsh
942 Marlin Circle
Jupiter, Fl. 33458

Dear Mr. Walsh:

This is to reference to the complaint of discrimination you filed against the Department of Interior (DOI), National Park Service (NPS), Everglades National Park, Homestead, Florida, case no. FNP-98-075, March 23, 1998. By letter dated June 5, 1998, the following allegation was accepted for processing:

> You believe you were discriminated against on the bases of race(White), sex(male), and age(over40) when you were not selected for the position of Concessions Management Specialist, GS-1101-05/07/09, vacancy announcement number EVER-97-15, at Everglades National Park. (You became aware in November 1997)

BACKGROUND

The record shows that you contacted the EEO Counselor on December17, 1997. The EEO Counselor was unsuccessful at resolving your complaint and March 23, 1998, you received the Notice of Final Interview/Right to File a Complaint letter. As stated, you filed your formal complaint on that same date, after which it was accepted by the NPS Office for Equal Opportunity. Your complaint was investigated during the period August 25 through November 11, 1998. The record reveals that you have not requested a final agency decision. Therefore, we are issuing the final agency decision on the merits of your complaint.

Accordingly, we have analyzed the entire complaint file, including the Report of Investigation(ROI). Based on our review, we have prepared the following analysis which explains the DOI's final decision regarding you complaint.

LEGAL STANDARD

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court established a procedure for analyzing claims of discrimination brought under Title VII. The Court stated that the Complainant "must carry the initial burden under the statute of establishing a prima facie case of discrimination." Id, at 802. The burden than shifts to "the employer to articulate some legitimate, nondiscriminatory reason" for its action. Finally, the complainant must be "afforded a fair opportunity to show that the employer's stated reason for [the action] was, in fact, pretext." Id, at 804. The burden of persuading the fact finder that the employer intentionally discriminated against him or her

remains with the Complainant through all stages of proof, to be satisfied by a preponderance of the evidence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)

With respect to you charge of age discrimination, the courts traditionally apply the same evidentiary framework for Age Discrimination in Employment Act (ADEA) cases as has evolved in the context of Title VII discrimination cases. The Complainant must show that he/she is being treated less favorably than a younger employee. The ultimate burden in an age discrimination case requires the Complainant to prove that age was a "determining factor" in the challenged employment decision. Cuddy V. Carmen, 694 F2d 853, 858, n.23 (D.C. Cir. 1982). In other words, age must make a difference in the employer" action; "but for" age discrimination, the employment decision at issue would not have occurred.

You are alleging discrimination based on sex, race, and age when you were not selected for the position of Concessions Management Specialist, GS-1101-5/7/9, advertised under vacancy announcement number EVER-97-15 at Everglades National Park. As stated, you must first establish a prima facie case sufficient to justify an inference of discrimination. A prima facie case in your allegation of discrimination in non-selection for the position at issue can be established by showing that: (1) you are a ember of protected group under Title VII and the ADEA; (2) you applied and were qualified for the position in question; (3) you were not selected; and (4) an individual not of your protected group was selected for the position.

DISCUSSION AND ANALYSIS

You state that, during the period relevant to your complaint, you held the position of Motor vehicle Operator, WG-5073-5, at Hobe Sound National Wildlife Refuge, U.S. Fish and Wildlife Service (FWS), Hobe Sound, Florida. You state that you became aware of a vacancy for the position of concessions Management Specialist, GS-1101-5/7/9, with the NPS, advertised on March 27, 1997, under vacancy announcement number EVER-97-1, and submitted your application. The record also shows that a rating and ranking panel was convened and three (3) candidates were referred as the best qualified to the selecting official for consideration. On August 27, 1997, Cherrie Brice, (Black, female, DOB: 10-31-62) was selected for the position.

Prima Facie Case

With respect to your allegation of discrimination based on sex, race and age, the record shows that you are a member of a protected group because of your race (White), sex (male), and age (48). You applied and were qualified for The Concessions Management Specialist position advertised by the NPS. However, you were not selected and person outside your race, sex and age was selected. Therefore, you established a prima facie case of discrimination on these bases.

Once a Complainant establishes a prima facie case of discrimination, the burden of proof shifts to the Department to articulate a legitimate, nondiscriminatory reason(s) for the complained of action(s).

Management's Articulated Reason

The selecting official, Henry C. Benedetti (White, male, age 58), Chief, Concessions Management, states that your name did not appear on any of the certificates referred to him for consideration. He states that he had no involvement with the rating or ranking of candidates, or with the rating panel that reviewed the applicants' qualifications. Mr. Benedetti states that the selectee was chosen because of her prior experience and background with the NPS. He said his decision was not based on affirmative action considerations, and that race, sex and age were not factors in his selection decision (Exhibit 5).

Monte D. Camp, (White, male, age 52), contracting Officer, was a panel member who evaluated the qualifications of the applicants for the position at issue. He said each panel member individually rated each applicant's qualifications, and then the panel was guided by a personnel specialist to reconcile the scoring. Mr. Camp stated that he rated your qualifications at the GS-5, 6, and 7 grade levels. He said your application reflected a very general background-having been in business for yourself-that was similar to the experience for the position in question. However, he said your background did not demonstrate the specific experience required in the Knowledge, Skills and Abilities (KSAs). He said sex, race and age were not factors in the evaluation of the applicants' qualifications. (Exhibit 6)

The record reveals that two other panel members, Mr. Peter Allen and Mr. Louis Pena, are no longer employed with the agency.

Raquel Perez (Hispanic, female, age 34), Personnel Management Specialist, GS-11, stated that she was

responsible for processing the vacancy announcement, reviewed the applications to insure that minimum qualifications were met, and issued the promotion certificates to the selecting official. Ms. Perez stated that the position was initially advertised at the GS-7/9 grade level and later re-advertised at the GS-5/7/9 grade level in order to increase the applicant pool. She said the applications of the candidates who met the minimum qualifications were presented to a three-member panel. Each panel member rated each applicant individually, and than a consensus was reached. Ms. Perez stated that your score of 44 was below the cutoff scores for the GS-5 level (the average break was 57 and the natural break was 54). Ms. Perez stated that your name was not referred on the certificate at any grade level because you did not make the cutoff score. She said that you were the only candidate for the GS-6 and GS-7 levels, and no candidate qualified for the GS-9 level. Ms. Perez affirmed that no consideration was given to race, sex or age in the rating process.

Ms. Perez said she had discussions with you regarding your consideration for the position. She said you were told that you were not referred for final consideration because your scores were lower than the cutoff scores. She said you were informed that you did not meet the minimum qualifications for the position, and, therefore, your name was not recommended for further consideration. (Exhibit 7)

Based on the above witnesses' statements, management has articulated legitimate, nondiscriminatory reasons for their selection decision. The burden now returns to you to establish by a preponderance of the evidence, that the reasons are a pretexts for unlawful discrimination.

Pretext

In your rebuttal you point out several inconsistencies in Mr. Benedetti's affidavit, particularly in the manner in which M. Benedetti answered the questions of the investigator. However, your questioning Mr. Benedetti's answers do not indicate pretext for discrimination. You showed no discrepancies or contradictions of testimony as it relates to the facts of this case.

You also stated that you had previously been found to qualify for the same position at the GS-9 level with the NP and that you scored 99% and 96% on two separate and related OPM qualifying tests for the same position. You admit that the test was discontinued after 1995 as a result of a pre-trial settlement entered into by minority group members who alleged the test was biased against them. However, the record shows no relevancy of your previous ratings by OPM and your application for the subject position with the NPS. The record does show that you were qualified for the position at the GS-5 and 7 levels. The record does not show that you were better qualified than other candidates bases on your previous OPM ratings.

You aver that the selection process was predicated on affirmative action considerations. (Exhibit 8) You stated that you believed the selecting official had performance standards concerning affirmative action quotas that disfavored "eligible non-preferenced males." The record does not contain any evidence that affirmative action was a consideration in this selection process. In fact, all agency officials involved in the selection process affirmed that no consideration was given to race, sex or age. Mr. Benedetti, the selecting stated that he was not under any pressure to hire minorities and/or females for the position. (Exhibit 5, pg. 8)

It is noted that a question was raised regarding the use of a rating panel for this position because there were less than ten candidates. Valerie A. Proctor (White, female, age 43), Personnel Officer, GS-13, stated that, although she was not involved in the selection process for the position at issue, the Merit Promotion Plan does state that rating and ranking of candidates is not required when there are fewer than ten promotion-eligible candidates. She states that this was an "error" and all eight eligible candidates, including you, should have been referred to the selecting official for consideration. Ms. Proctor states that your name would have been referred to the selecting official if the error had not been made.[1] She said no consideration was given to race, sex or age as a result of the error that was made regarding your consideration for the position at issue. The record shows that the panel referred three candidates to the selecting official (3 female, 1 Black, 2 race not identified, ages 35, 35 and 44). Five candidates scored below the cutoff point and were not referred to the selecting official (4 male, 1 female, race not identified, ages 39, 40, 42, 47, and 49). Exhibit 9; 13, 14)

The DOI Merit Promotion Plan guidance date February 8, 1996, states, as it relates to panels, the following:

> Q. What rating/ranking procedures should be followed prior to the referral of applicants for selection consideration?
>
> A. "...Regardless of the number of applicants, qualitative distinctions must be made among the

[1] Ms. Proctor stated that during EEO counseling, an the informal resolution offer was made to you priority consideration for the next available Concessions Management Specialist vacancy. Ms. Proctor said that you declined to accept the informal resolution agreement.

> promotion eligible in terms of relative merit and ability. If there are more than 10 candidates eligible for promotion, a formal rating schedule must be developed or an automated ranking process will be used. Use of a rating/raking panel is optional...If there are 10 or fewer promotional candidates, a determination as to the "well qualified" must be made...Rating and ranking decisions must be documented and kept in a case file..." (Exhibit 21)

Based on the above, it does not appear that the NPS erred when they held a panel the eight applicants. Regardless of the number of candidate, the NPS was required to address the qualifications of the candidates prior to referral to the selection official. In this case, a panel was convened. As stated above, nothing in the record demonstrates that the rating of the applicants was motivated by unlawful discrimination.

You state that your are convinced that, had you been referred, you would have been selected because of your experience. Your contention, however, is speculative and without support. There is no evidence in the record that would indicate that you would have been the selectee.

The evidence indicates the qualifications of the selected candidate are consistent with the reasons articulated by the selecting official as the reasons for her selection, I.W., prior experience with the NPS and directly relevant experience with KSAs identified in the vacancy announcement. The selectee was the highest scoring candidate at the GS-5 level. The record shows that your application was not assessed as

high as the selectee's application. You have not produced b a preponderance of the evidence that the reasons articulated by the NPS management officials were pretext for unlawful discrimination.

CONCLUSIONS AND FINDINGS

Bases on the above analysis, it is the decision of the Department of the Interior that you were not discriminated against based on your race, sex, or age when you were not selected for the position of Concessions Management Specialist, GS-1101-5/7/9. Therefore, no remedies or attorney's fees are warranted. This notice is the final agency decision regarding your complaint. If you are dissatisfied with the decision, you have the following appeal rights:

APPEAL RIGHTS

You may file an appeal with the Equal Employment Opportunity Commission with 30 calendar days of receipt of this decision. The 30-day period for filing an appeal begins on the day after the date of receipt of this decision. The appeal shall be considered timely if it is delivered in person, by facsimile or postmarked before the expiration of the applicable filing period. In the absence of a legible postmark, the appeal will be considered timely if it is received by mail within five days of the expiration of the applicable filing period.

Appeals to the Commissions should be forwarded to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036, with a copy to this Office. You may also hand-deliver the appeal to the commission, Office of Federal Operations at 1801 L Street, NW, Washington, D.C. or by fax at (202) 663-7022. Any statement or brief in support of your appeal must be submitted to the Commission with a copy to this Office within 30 days of filing the Notice of Appeal.

CIVIL ACTIONS

In lieu of an appeal to the Commission, you may file a civil action in an appropriate United States District Court within 90 calendar days of receipt of the final decision.

If you file an appeal with the Commission, and you are not satisfied with the Commission's decision, you may file a civil action in a United States District Court within 90 calendar days of receipt of the Commission's final decision.

You may also file a civil action any time after 180 calendar days from the date of filing an appeal with the Commission, if there has been no final decision by the Commission.

Upon request of the complainant, the Civil Rights Act and the Rehabilitation Act give the Court discretionary authority to appoint an attorney without payment of fees or costs by the you. The grant or denial of your request is within the sole discretion of the Court. Your request and the civil action must be filed within 90 days of the date the final decision is received. Please note that the Age Discrimination in Employment Act contains no specific provision for a court-appointed attorney.

If you file a civil action involving this complaint, you must specifically name the Secretary of the Department of the Interior, Bruce Babbitt, as defendant. Failure to do so may result in the loss of any judicial redress to which you may be entitled.

It is important to note that 29 C.F.R. Section 1614.410 states, "Filing of a civil action under 1614.408 or 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing."

Sincerely,
S/_____

E. Melodee Smith
Director, Office of Equal Opportunity

Enclosure-EEOC Appeal Form

Cc: Dianne Spriggs, EEO Officer, NPS
Robert Walter, Assistant Solicitor, General Law

The constitutional provisions, treaties, statutes and regulations involved in the case with appropriate citation and reference to the petition are as follows:

1.) The Constitution of the United States including Article 1 Section 8,
[14] "To make Rules for the Government..." (at 5)
[18] "To make all Laws which shall be necessary and proper for carrying into Execution the Foregoing Powers,..." (at 5)
Section 9,
[3] "No Bill of Attainder or ex post facto law shall be passed." (at 9, 10, 2)
[8] "No Title of Nobility shall be granted by the United States..." Article III (at 10, 27, 3)
[2] "...no attainder...shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained. (at 2, 3, 10)

Article VI:

[2] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof,...shall be the supreme law of the land..." (at 5)

Amendment(s) V:
"No person shall...be deprived of ...liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation."
VII: "in suits of common law...the right of trial by jury shall be preserved..." (at 26, 27)
IX: "The enumeration in the Constitution, of certain rights, shall not construed to deny or disparage others retained by the people."

X: "The powers not delegated to the United States by the Constitution…are reserved…to the people."
XIV: "'due process of law' nor deny equal protection of the laws."(at 5, 13, 14, 16, 17, 20, 22, 23, 30, 2)

2.) The United Nations treaty/agreement of 1949 entitled: "The Universal Declaration of Human Rights" and as contained therein:
Article 1. All human beings are born free and equal in dignity and rights…
Article 2. Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status…(at 30)
Article 23. (1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work…"

Moreover, the United Nations has specifically disallowed the payment of reparations as a means to "settle old scores" that stem from past relations. This is also to state that preferences, as based on proscribed factors, are undeniably a form of reparations, whose affects are unduly concentrated on the non-influential, non-connected, and non-moneyed segment of the non-preferred so called protected class of non-minority males. Such is particularly relevant as pertaining to the Federal actors competitive civil service component as statistical analysis reveals. (at 2, 3, 4)

3.) Pertinent statutes and regulations include but are not limited to the following:
1. Title VII of the Civil Rights Act of 1964, 42 U.S.C.A./2000e-2. (a), 29 U.S.C.A./621-634, Amendments of 1972 to Title VII by which Congress extended the protections of Title VII to the Federal Government,

the Pendleton Act-5 U.S.C.A./1101-1105 (1966) Civil Service Reform Act (CSRA) of 1978, Pub. L. No. 95-454, 92 Stat.IIII (codified in sections of 5, 10, 15, 28, 31, 38, 39, and 42 U.S.C.A.) (at 3)

2. UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES: 29 CFR 1007. 1-18, 102. 29 CFR 1614. 103-110, 201-606. (at 3, 18, 26)

3. The Presidential directive of July 19, 1995 to agency heads regarding the: Justice Task Force...All Agency Review of Affirmative Action Programs'' in response to the Adaranc Constructors, Inc. v. Pena decision. (at 4, 5, 29, 3, 4, 7, 8)

4. TITLE 5, UNITED STATES CODE, section 2301: Merit System Principles. (at 8, 11)

5. U.S. Department of Justice EOUSA Resource Manual: Employee Selection.

6. U.S. Office of Personnel Management, Group Coverage Qualification Standard for Administrative and Management Positions. (at 3, 9, 17-20, 22, 7)

7. The Department of the Interior's Merit Promotion and Placement Policy and the Departmental Merit Promotion Plan-Amendment of February 8, 1996. (at 11, 12, 18)